

1 HONORABLE JAMES L. ROBART
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 MICROSOFT CORPORATION, a
Washington corporation,

Case No. 10-1823

11 Plaintiff,

12 vs.

13 MOTOROLA, INC., and MOTOROLA
MOBILITY, INC.,

14 Defendants

15 PLAINTIFF MICROSOFT'S
16 SURREPLY TO STRIKE PORTIONS
17 OF THE SUPPLEMENTAL
18 DECLARATION OF NORMAN H.
19 BEAMER IN SUPPORT OF
20 MOTOROLA, INC. AND MOTOROLA
21 MOBILITY, INC.'S MOTION TO
22 DISMISS

23 **NOTED ON MOTION CALENDAR:**
24 **Friday, January 7, 2011**

25 **ARGUMENT**

Pursuant to Local Rule CR 7(g), Plaintiff Microsoft Corporation submits this surreply to strike Paragraphs 3 and 4, and Exhibits 1 and 2 to the Supplemental Declaration of Norman H. Beamer in Support of Motorola, Inc. and Motorola Mobility, Inc.'s Reply to Microsoft's Opposition to Motion to Dismiss ("Beamer Supplemental Declaration") (Dkt. No. 41), and those portions of Defendants' Motorola, Inc. and Motorola Mobility, Inc.'s ("Motorola's") Reply relying on those paragraphs and exhibits.

1 “In ruling on a 12(b)(6) motion, a court may generally consider only allegations
 2 contained in the pleadings, exhibits attached to the complaint, and matters properly subject to
 3 judicial notice.” *Walters v. Seattle Sch. Dist. No. 1*, No. C08-264JLR, 2008 U.S. Dist. LEXIS
 4 84958, at *8-9 (W.D. Wash. Sept. 15, 2008) (J. Robart), *citing Swartz v. KPMG LLP*, 476 F.3d
 5 756, 763 (9th Cir. 2007); *see also Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
 6 1542, 1555 n.19 (9th Cir. 1989). A party may file a surreply requesting to “strike material
 7 contained in or attached to a reply brief.” Local Rules W.D.Wash. 7(g); *Hutt v. Pierce County*,
 8 No. 09-5271BHS, 2009 WL 4066839 (W.D. Wash., November 20, 2009).

9 Microsoft requests that the Court strike Paragraphs 3 and 4, and Exhibits 1 and 2 to the
 10 Beamer Supplemental Declaration because they refer to or contain information that may not be
 11 properly considered on a motion to dismiss. The information includes purported print-outs
 12 from the Microsoft Xbox website describing the cost of one version of the Xbox 360 and an
 13 Xbox 360 WiFi adapter. Neither the exhibits nor the paragraphs contained in the declaration
 14 purportedly authenticating them are the proper subjects for judicial notice. The exhibits were
 15 not attached to Microsoft’s Complaint. They are laden with extraneous facts that are not
 16 referred to in Microsoft’s Complaint. And none of the exhibits or the disputed facts set forth in
 17 paragraphs 3 and 4 is integral to Microsoft’s complaint.

18 Under Fed. R. Civ. P. 12(d), when matters outside the pleadings are presented and not
 19 excluded, a motion to dismiss must be treated as a motion for summary judgment, and
 20 Microsoft must be given the opportunity to present all materials pertinent to the motion. In this
 21 instance, the materials selected by Motorola are incomplete. Microsoft would demonstrate that
 22 the materials are consistent with the allegations in the pleadings and that Motorola’s insistence
 23 on seeking a fixed royalty rate on products having widely varying prices is itself evidence of its
 24 failure to comply with its RAND obligations. Microsoft has alleged exactly that (*see*
 25 Complaint, ¶¶ 6, 65), and this allegation must be accepted as true by the Court, *see NL*

1 *Industries v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). In any event, those are issues of fact
2 for ultimate resolution in the case.

3 As the court in *Research in Motion v. Motorola* held in denying Motorola's motion to
4 dismiss Research in Motion's RAND claim:

5 RIM's complaint alleges that Motorola 'has refused to extend FRAND
6 ...licensing terms to RIM for any of Motorola's purported essential
7 patents...and has instead demanded of RIM terms that are unfair, unreasonable,
8 and on information and belief, discriminatory.' Motorola's argument merely
9 contradicts the factual accuracy of this statement. At this stage of the case, the
court takes RIM's pleadings as true. RIM has adequately pled that Motorola did
not honor its promise to license on FRAND terms. Motorola's contention
otherwise is entitled to no weight on a Rule 12(b)(6) motion.

10 644 F. Supp. 2d 788, 797 (N.D. Tex. 2008) (internal citations omitted). That is all Motorola
11 has done here as well.

CONCLUSION

12 For these reasons, Microsoft respectfully requests that this Court strike Exhibits 1 and
13 2, and Paragraphs 3 and 4 of the Beamer Supplemental Declaration, along with those portions
14 of Motorola's Reply (*see* Reply at 5) relying on these portions of the Beamer Supplemental
15 Declaration.

17 DATED this 12th day of January, 2011.

18 DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

20 By _____ /s/ Arthur W. Harrigan, Jr.
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on January 12, 2011, I electronically filed the foregoing document
3 with the Clerk of the Court using the CM/ECF system which will send notification of such
4 filing to the following: Philip S. McCune and Lynn M. Engel at Summit Law Group, PLLC.

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6 _____
7 /s/ Linda Bledsoe
Linda Bledsoe